No. 21,939

United States Court of Appeals

FOR THE NINTH CIRCUIT

SONOCO PRODUCTS COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Petition
for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

These proceedings are before the Court on a petition for review and a cross-petition for enforcement of a decision and order of the National Labor Relations Board finding petitioner, Sonoco Products Company ("Sonoco"), guilty of violating Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C.,

Sec. 151, *et seq.*). The Board's decision and order (R. 96-104)[1] are reported at 165 NLRB No. 68. The unfair labor practices were committed in Hayward, California, where petitioner is engaged in the manufacture of spiral paper tubing. This Court, therefore, has jurisdiction under Section 10(e) of the Act.

COUNTERSTATEMENT OF THE CASE

The Board found that petitioner's admitted refusal to bargain with the certified representative of its employees[2] violated Section 8(a)(5) and (1) of the Act (R. 70). In so ruling, the Board rejected petitioner's contentions that (1) the election proceedings upon which the Unions' certification rested were invalid and (2) the Company's objections to the election raised material factual issues which required a formal Board hearing. The evidence upon which the Board based its findings is summarized below.

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[1] References to the formal documents reproduced as "Volume I, Pleadings" are designated "R."

[2] Two unions were certified as a joint representative of the unit employees: Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Warehouse, Processing and Allied Workers Local No. 6, International Longshoremen's and Warehousemen's Union.

A. The First Election

On March 23, 1966, the Board conducted a secret ballot election at Sonoco's Hayward plant as a result of the Unions' joint petition for representation. The Tally of Ballots showed 17 votes against Union representation and 13 votes for representation. The Unions filed timely objections, however, alleging, *inter alia*, that the Company had interfered with the conduct of a fair election because of the content of its speeches delivered to employees on the day prior to the election (R. 8-10). During the ensuing Board investigation, the Company furnished copies of these speeches. The speech delivered by Plant Manager Murry Hughes admittedly contained the following remarks (R. 13):

> If this union organizational activity had not been started, you would now be enjoying even higher base rates and other fringe benefits. The Company was not able to grant these improvements, however, because of the union organizational drive. Those of you who have worked here for several years are surely aware of the fact that wages and fringe benefits have been increased every year without interruption since beginning the operation in Fremont in 1959. At the time of our increases in wages and fringe benefits last year, we had been losing large amounts of money and an increase at that time was really not justifiable, but an increase of 5¢ to 8¢ was granted anyhow. We granted this increase because of our faith in you and in the future of this plant. We cannot say at this time how much of an increase you would have already been granted this year if it were not for

> the union activity, but it was certainly greater than what was granted last year.
>
> Another program that we had initiated in your behalf before the union organizational activity began was a job evaluation program. I have letters in my office dating back to August 1965, concerning the establishment of this program. On January 10th, of this year, I wrote a letter to Harrison Martin telling him that we had completed writing job specifications and were ready to proceed with this program so that it could be tied in with our annual review of wages and fringe benefits. Again we were unable to proceed with this program, which would have been beneficial to you, because of the union organizational activity.

The Board's Regional Director issued a Supplemental Decision and Order setting aside the March election and directing that a new election be conducted. In the Regional Director's view, the quoted remarks by Plant Manager Hughes constituted an unwarranted attempt to blame the Unions for the Company's refusal to institute certain new benefits and thereby tended to interfere with the employees' exercise of a free choice (R. 13-14). The Regional Director did not decide whether Hughes' remarks constituted a violation of Section 8(a)(1) of the Act, nor did he consider whether the Company's refusal to grant benefits itself violated the Act.[3]

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[3] In view of his decision to conduct another election, the Regional Director also found it unnecessary to resolve certain factual issues disclosed by his investigation: *e.g.*, whether certain Company supervisors had coercively interrogated employees or threatened them with a plant closing in the event of unionization (R. 14, n. 5).

The Company requested Board review of the Regional Director's decision. In its Request (R. 17-24), the Company did not contend that there was any new relevant evidence that the Regional Director had failed to consider. Instead, the Company simply contended that Hughes' speech did not violate Section 8(a)(1) of the Act. The Board, finding "no substantial issues warranting review", denied the request for review on June 27, 1966 (R. 33).

B. The Second Election

A second election was held on August 17, 1966, and resulted in a majority of ballots being cast in favor of the Unions (16 for, 14 against, and 1 challenged) (R. 34).[4] Sonoco filed timely objections complaining that the Unions had coerced and intimidated its employees and deprived them of a free and untrammeled choice in the election (R. 35-41). Among the specific objections there raised were three claims renewed here by the Comapny: (1) the claim that Union agents threatened employee Mendonca with physical harm on the day of the first election (R. 44); (2) the claim that employee Scroggins received a telephone call from a union agent, on the night before the second election, in which he was told that a certain Company supervisor was "out to get [him] fired" and that Scroggins had therefore "better vote for the Unions if he wanted to preserve [his] job" (R. 37-38); and (3) the claim that a Union organizer engaged in campaigning at the plant on the day of the second election (R. 45-46).

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[4] The one challenged ballot was cast by Danny Stewart, who had been active in the Union campaign. Stewart's eligibility to vote was challenged on the grounds that he had recently been promoted to the job of foreman.

The Regional Director, after conducting an investigation, concluded that none of these claims warranted invalidating the second election (R. 46). Furthermore, he found, there were no conflicts in the evidence disclosed which would warrant a formal evidentiary hearing (R. 46, n. 2). Accordingly, he denied the Company's request for a hearing, overruled the objections in their entirety, and issued a certification of the Unions as exclusive bargaining representative (R. 46).

Thus, with respect to the first objection, relating to employee Mendonca, the investigation disclosed that the incident referred to by the Company occurred prior to the first election. Pursuant to Board policy, the Regional Director concluded that the incident was too remote in time to warrant invalidating the second election (R. 44). The Company did not dispute that the incident in question occurred prior to the first election.

With respect to the second objection, relating to employee Scroggins, the investigation disclosed that Scroggins had been told by a Union agent that a certain Company foreman was "set against him" and that, in fact, this foreman had complained about Scroggins to other employees. There was no evidence that the Union had substantially misrepresented the foreman's attitude. Accordingly, whether or not Scroggins was urged to vote for the Union in order to preserve his job — Scroggins denied being told this — the objection was deemed without merit (R. 45). The Company submitted no evidence regarding the foreman's attitude.

Finally, with respect to the Company's complaint that a Union organizer engaged in "electioneering" at the polls on the day of the second election, the investigation showed that Ray Gonzalez, a former Company employee, was driven to the plant that day. He was met immediately

at the employee entrance by a management official, before he could reach the polls, and asked to leave the premises. Gonzalez did leave, without speaking to employees, except to ask one of them for a ride off the property. Since the undisputed evidence showed that Gonzalez was not near the polls and did no campaigning, the Regional Director found it unnecessary to determine whether Gonzalez was a Union agent (R. 46). The Company submitted no evidence tending to show that Gonzalez might have reached the polling area or that he ever discussed campaign matters with any employee.[5]

The Company filed a Request for Review of the Regional Director's Decision (R. 48-55), arguing that there was a conflict in the evidence which required a hearing, or, if the factual claims of the Company be accepted as true, that the election must be deemed invalid. The Board denied the Request on November 14, 1966 (R. 56).[6]

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[5] The Company submitted other specific objections as well, but they were also overruled by the Regional Director and have not been renewed here.

[6] In support of its Request for Review, the Company directed the Board's attention to an affidavit of Murry Hughes, plant manager, which it had submitted to the Regional Director. The Company also claimed that it was ready to prove a number of critical factual assertions: *e.g.*, that employee Mendonca "changed his vote" because of union "threats", that Ray Gonzalez "talked to several employees at a time while they were waiting in line to vote" (R. 53). Hughes' affidavit, however, did not support these factual assertions, and the Company submitted no other evidence in support of its claims.

C. The Unfair Labor Practice Proceedings

After being certified, the Unions repeatedly requested the Company to bargain but their requests were denied (R. 76-79). Acting upon Union charges, the Board's General Counsel issued a complaint alleging Section 8(a)(5) and (1) violations (R. 59-62). In its answer, the Company admitted its refusal to bargain but challenged the propriety of the representation proceedings (R. 65-68). The General Counsel thereupon filed a motion for summary judgment with the Board on the grounds that there were no issues of fact or law requiring a hearing (R. 79).

On April 11, 1967, the Board issued an order transferring the matter to the Board and requiring the Company to show cause why the motion for summary judgment should not be granted. Company counsel filed a response to this order which asserted that there were "substantial factual issues" which required a formal hearing. Specifically, counsel alleged that he was ready to prove certain "facts" which would demonstrate the invalidity of the second election. In describing these "facts", counsel reiterated the assertions already made to the Regional Director; again, Hughes' affidavit and an attached statement — which did not support the assertions of counsel — was the sole evidence submitted by the Company in support of its offers of proof.

For example, in opposing the motion for summary judgment, Company counsel asserted a readiness to prove that employee Mendonca had told plant manager Hughes that he (Mendonca) had changed his vote solely because of Union threats of physical harm (R. 86). Hughes' own affidavit, however, states otherwise: Mendonca had told Hughes prior to the second election, that "the [Union] matter had been cleared up and that he was no longer afraid" (R. 88-

89). Again, counsel offered to prove that "Mr. Gonzalez talked to employees" while they were waiting to vote in the second election (R. 86). Hughes' affidavit, however, states otherwise: according to Hughes, Gonzalez was stopped at the entrance to the plant and denied access. Nothing in the affidavit conflicts with the Regional Director's finding that Gonzalez engaged in no campaigning near the polls (R. 90). Finally, counsel also offered to prove that the Union organizer made "totally false" statements when he told employee Scroggins that a Company foreman wanted to have Scroggins fired (R. 86). But the Hughes affidavit contains no testimony relating the foreman's true attitude, and there was no other evidence submitted by the Company to conflict with the Regional Director's finding on this point.

The Board, therefore, rejected the Company's argument that its objections to the second election raised issues of fact which required a formal hearing (R. 98). Further, the Board noted, all the contentions relied upon in opposition to the motion for summary judgment had previously been considered and found lacking in merit during the representation proceedings (R. 99). Since the Company did not present any newly-discovered evidence in support of these contentions, the Board affirmed its own prior rulings and granted the motion for summary judgment (R. 99). The Board concluded that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, and ordered the Company to bargain with the Union and post a remedial notice (R. 100-103).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY'S REFUSAL TO RECOGNIZE AND BARGAIN WITH THE CERTIFIED UNIONS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

A. The Board reasonably exercised its discretion in concluding that the first election should be set aside

Settled law affords the Board a wide area of discretion in deciding whether to set aside an election because of the impact on the electorate of surrounding circumstances.

> Whether to set aside an election because of incidents during the campaign period is a matter for the sound discretion of the Board. As has been frequently remarked: * * * 'Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.' *N.L.R.B. v. Waterman Steamship Corp.*, 309 U. S. 206, 226 . . .; *N.L.R.B. v. A. J. Tower Co.*, 329 U. S. 324, 330 . . . *Rockwell Mfg. Co., Kearney Div. v. N.L.R.B.*, 330 F.2d 795, 796 (C.A. 7), cert. denied, 379 U. S. 890.

Accord: *N.L.R.B. v. Howell Chevrolet Co.*, 204 F.2d 79, 86 (C.A. 9), affirmed, 346 U. S. 482; *Foreman & Clark, Inc. v. N.L.R.B.*, 215 F.2d 396, 409 (C.A. 9), cert. denied, 348 U. S. 887; *Department & Specialty Store Emp. Union, Local 1265, RCIA v. Brown*, 284 F.2d 619, 627 (C.A. 9), cert. denied, 366 U. S. 934. The only question for the courts is

whether the Board reasonably exercised its discretion. *N.L.R.B. v. J. R. Simplot Company*, 322 F.2d 170, 172 (C.A. 9); *International Tel. & Tel. v. N.L.R.B.*, 294 F.2d 393, 395 (C.A. 9); *Neuhoff Brothers Packers, Inc. v. N.L.R.B.*, 362 F.2d 611, 614 (C.A. 5), cert. denied, 386 U. S. 956; *Olson Rug Company v. N.L.R.B.*, 260 F.2d 255, 256 (C.A. 7); *Surprenant Mfg. Co. v. Alpert*, 318 F.2d 396, 399 (C.A. 1).

On the record in this case, it can hardly be questioned that the Company's conduct, prior to the first election, jeopardized the opportunity for an untrammeled expression of employee sentiment. Just before that election, Company officials delivered a series of speeches to the employees in which the employees were admittedly urged to reject the Unions. The Company supported its arguments by telling the employees that they would have already received a wage increase and other benefits had it not been for the union organizing campaign (*supra*, pp. 3-4).

In the Board's view, these remarks interfered with the conduct of a fair election by unjustifiably blaming the Unions for a loss of potential improvements in working conditions. It was the Company's decision — not the Unions' — that resulted in withholding the employment benefits; by blaming the Unions, however, the Company undermined the Unions' sought-for status as an effective representative and characterized it, falsely, as a detriment to the employees. In similar situations, the Board has previously decided to set aside elections because of the likelihood that the employer's conduct prejudiced the opportunity for a fair election. See, e.g., *Foreman & Clark, Inc., supra; Brandenburg Telephone Co.*, 164 NLRB No. 26 (Trial Examiner's Decision, p. 28), *Cadillac Overall Supply Co.*, 148 NLRB 1133, 1135-36.

The Company argues that its remarks were within the realm of "persuasion" and "legitimate comment" (Br., p. 12) but the authority cited for this proposition is plainly distinguishable. In none of those cases did the employer tell his employees that they were losing a benefit, which otherwise would have been granted, solely because of a union organizing campaign. Nor does the Company advance its case by accusing the Regional Director of relying upon a *segment* of Hughes' speech. The Board agrees, of course, as the Company argues, that words must be read in context. But there is simply nothing in any of the other portions of Hughes' speech, or indeed in any of the speeches by other Company officials, to modify or qualify the assertions by Hughes which prejudiced the first election. As petitioner's brief itself explains, the entirety of the speech merely indicates a discussion of "Sonoco's past wage policy as bearing on the issue of whether anything could be gained by unionization" (Br., p. 7). With this context, or without it, Hughes' prejudicial remarks remain prejudicial.

Petitioner also argues that the Company was faced with a "dilemma" which required explanation to the employees: if the Company withheld the increase in benefits, thereby changing its past practice, it would have faced unfair labor practice charges; on the other hand, granting the benefits during an organizing campaign would also have invited "a charge of bribery" (Br., p. 9). Therefore, petitioner asserts, it should be allowed to address itself to the issue and explain its policy to employees. But this "dilemma" is a spurious one. The law does not prohibit an employer either from granting benefits, or from refusing to grant benefits, merely because an organizing campaign is in progress. What the Act prohibits is conduct undertaken for the purpose of inducing employees to vote against the union. *N.L.R.B. v. Exchange Parts Co.*, 375 U. S. 405. Moreover, if the Company was interested in

explaining to employees that it was withholding benefits solely to discourage the filing of a meritless charge of unfair practices, it could readily have so stated. Instead, the Company asserted repeatedly that the reason for its decision was "union activity", or "the union organizational activity." Rather than communicating a legitimate — albeit tenuous — explanation, the Company thereby suggested that its motivation might have been the very one proscribed by the Act.[7]

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[7] As already noted, however, the Regional Director did not consider whether a Section 8(a)(1) violation had been committed, nor were Section 8(a)(1) charges ever filed with respect to Hughes' conduct. Accordingly, we need not reply to Petitioner's argument that this conduct was not prohibited by Section 8(a)(1) and that it was protected by Section 8(c). The Board is entitled to set aside an election because of conduct which does not necessarily constitute an unfair labor practice. And the employer's constitutional right of free speech, embodied in Section 8(c) of the Act, is not infringed when the Board so acts. *Foreman & Clark, Inc., supra,* 215 F.2d at 408-409 (C.A. 9); *N.L.R.B. v. Shirlington Supermarkets, Inc.,* 224 F.2d 649, 652-653 (C.A. 4), *cert. denied,* 350 U.S. 914; *N.L.R.B. v. Clearfield Cheese Co.,* 322 F.2d 89, 92 (C.A. 3); *N.L.R.B. v. Tennessee Packers, Inc.,* 379 F.2d 172, 181 (C.A. 6); *Greenboro Hosiery Mills, Inc. v. Johnston,* __ F.2d __, __ (C.A. 4) 65 LRRM 2299; *General Shoe Corp.,* 77 NLRB 124, 126.

B. The Board reasonably exercised its discretion in concluding that the second election should not be set aside

In overruling the Company's objections to the second election, the Board and its Regional Director acted well within the scope of the broad authority vested by the Act. The Regional Director conducted an investigation into all the matters raised by the Company, and set forth the evidence and his findings in detail (*supra*, pp. 6-7). As we show in detail, *infra*, at pp. 16-20, none of the relevant facts were the subject of conflicting evidence; therefore, the sole question presented by the Company's objections was whether the incidents complained of warranted invalidating the election.

1. The Jack Mendonca incident. As shown, *supra*, p. 6, there was evidence that three union organizers had threatened Mendonca with a beating on the day of the first election because he appeared near Company premises with a sign bearing the legend "Better dead than red" (R. 44). The Regional Director assumed this to be true but concluded that the incident was too remote in time to constitute grounds for invalidating the second election. That judgment was plainly a reasonable one. The two elections were 5 months apart. Any coercive impact attributable to the Mendonca incident could hardly be presumed to linger so long, especially since the Board set the first election aside and advised the employees that they would have a later opportunity to register their sentiment freely and without fear of reprisal. In disputing the Regional Director's judgment that a 5 month hiatus would suffice to dissipate any lingering effects of the March 23 incident, the Company plainly errs.

As the Company points out (Br., p. 13), the Board's current policy in re-run election cases is to exclude consideration of conduct which occurs before the first election. *The Singer Co.*, 161 NLRB No. 87. The Regional Director had found that the threats to Mendonca were too remote because they occurred prior to the notice for a new election. The standard employed by the Regional Director was apparently erroneous, but the error was harmless since the conduct in question occurred before the first election.[8]

The Regional Director's investigation also disclosed that Mendonca's relatives subsequently received telephone calls from a union agent. But no basis for setting aside the election emerges from this evidence, either. Mendonca's relatives and the union agent were personal friends; the agent was simply interested in learning Mendonca's objections to the Union; and Mendonca himself subsequently telephoned the Union agent and engaged in peaceful discussions with him (R. 45). Even the affidavit submitted by the Company's own witness conceded that Mendonca had announced, prior to the second election, "that the matter had been cleared up and that he was no longer afraid" (R. 88-89).

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[8] The *Singer* case, which clarified the appropriate cut-off date for such cases, did not issue until after the Regional Director's decision in this case. Petitioner did not complain to the Board about the matter and, since the Mendonca incident was obviously too remote under either test, such a complaint would have been pointless.

2. The Gonzalez "electioneering" charge. The Regional director's investigation and the Hughes affidavit disclosed that Gonzalez had been turned away from the plant at the entrance, never reached the polls, and engaged in no discussion with employees (*supra,* pp. 6-7). In these circumstances, there is obviously no basis in logic or precedent for invalidating the election. *N.L.R.B. v. Moyer & Pratt, Inc.,* 208 F.2d 624 (C.A. 2); *N.L.R.B. v. Carolina Natural Gas Corp.,* __ F.2d __, 67 LRRM 2006, 2009 (C.A. 4).

3. The Scroggins incident. The investigation disclosed that employee Scroggins received a telephone call prior to the second election, was told by a union agent that a certain Company foreman was "set against him", and was asked if he was going to support the Union. There was a conflict in the evidence about whether the union agent told Scroggins that he had better vote for the Union in order to save his job; Scroggins denied being told this (R. 45). But the conflict was immaterial, since there was no evidence that the Union had misrepresented the foreman's attitude toward Scroggins. In any event, there would plainly be nothing improper about a union promise to protect an employee against a discharge motivated by personal dislike.

C. The Board was not required to conduct a formal hearing because the material facts were not in dispute

Neither the National Labor Relations Act nor the Administrative Procedure Act, 5 U.S.C., Sec. 554(a)(6)(Supp.II), provides a procedure for the resolution of post-election

objections.[9] The Board's Rules and Regulations, Series 8, Section 102.69(c), 29 C.F.R. Sec. 102.69(c) provide, however, that a hearing will be held on election objections where there are "substantial and material factual issues . . . which can be resolved only after a hearing."

The burden rests upon the party seeking a hearing to establish that "substantial and material" issues do exist which require a hearing for their resolution – he must point to specific evidence which has a basis in law for overturning an election which otherwise is presumed to have been valid. *N.L.R.B. v. Mattison Machine Works, Inc.*, 365 U.S. 123, 124; *N.L.R.B. v. Carolina Natural Gas Corp.*, __ F. 2d __, 67 LRRM 2006 (C.A. 4); *N.L.R.B. v. J. R. Simplot Co.*, 322 F. 2d at 172 (C.A. 9); *N.L.R.B. v. National Survey Service, Inc.*, 361 F. 2d 199, 207-208 (C.A. 7); *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F. 2d 172 (C.A. 6); *Rockwell Mfg. Co. v. N.L.R.B.*, 330 F. 2d at 797 (C.A. 7). The reasons for this rule were cogently stated by this Court in *N.L.R.B. v. J. R. Simplot Co.*:

> "The Board nonetheless makes it a practice to hold post-election hearings on objections to elections, but in keeping with the spirit of the Act *does so only when it appears that the allegations relied upon to overturn the election have a basis in law and there is evidence to support them.* The opportunity for protracted

[9] *N.L.R.B. v. J. J. Collins*, 332 F. 2d 523, 524 (C. A. 7); *N.L.R.B. v. Joclin Mfg. Co.*, 314 F. 2d 627, 632 (C. A. 2).

delay of certification of representation elections which would exist in the absence of reasonable conditions to the allowance of a hearing on objections is apparent. An objecting party who fails to satisfy such condition has no cause for complaint when and if his demand for a hearing is denied.[10]

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[10] The Sixth Circuit, in the *Tennessee Packers* case, *supra*, echoed this language and summarized the criteria for determining what constitutes "substantial and material issues."

> In order to raise "substantial and material factual issues," it is necessary for a party to do more than question the interpretation and inferences placed upon the facts by the Regional Directors. *N.L.R.B. v. National Survey Service, Inc.*, 361 F. 2d 199 (C. A. 7); *N.L.R.B. v. J. R. Simplot Company*, 322 F. 2d 170 (C.A. 9); *Macomb Pottery Company v. N.L.R.B.*, [376 F. 2d 450] No. 15675, decided April 18, 1967 (C.A. 7); *N.L.R.B. v. J. J. Collins' Sons, Inc.*, 332 F. 2d 523 (C. A. 7); *N.L.R.B. v. Sun Drug Co.*, 359 F. 2d 408 (C. A. 3). It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. *N.L.R.B. v. National Survey Service, Inc., supra; N.L.R.B. v. J. R. Simplot Company, supra; Macomb Pottery Company v. N.L.R.B., supra.* Mere disagreement with the Regional Director's reasoning and conclusions do not raise "substantial and material factual issues." This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing.

In this case, petitioner plainly failed to satisfy the prerequisite for a formal hearing: none of the evidence presented by the Company conflicted with the essential factual determinations made by the Regional Director. Thus, the Company has never come forward with any evidence to show that the Regional Director erred in finding that the Mendonca threat occurred on the day of the first election, five months remote from the election here sought to be invalidated.

Nor did the Company proffer any evidence tending to conflict with the Regional Director's findings that Gonzalez was stopped at the entrance to the plant and sent away without opportunity to engage in electioneering. To be sure, *petitioner's counsel,* in opposing summary judgment, *did offer to prove* that "Gonzalez talked to employees at a time while they were waiting in line to vote" (R. 86). But in support of that offer of proof, counsel submitted only an affidavit by the plant manager which clearly shows the contrary (R. 90), and fully supports the Regional Director's statement of facts. Unsupported allegations of counsel are hardly a sufficient basis for requiring a hearing. "Rather, as we have pointedly held, the 'objecting party must supply the Board with *specific evidence* which prima facie would warrant setting aside the election'" *N.L.R.B. v. Douglas County Electric Corp.,* 358 F. 2d 125, (C. A. 5). Accord: *Baumritter Corp. v. N.L.R.B.,* 386 F. 2d 117, (C. A. 1). Here, then, as in *Carolina Gas, supra,* ". . . the Company's allegations . . . appear to be no more than the dilatory maneuvers this screening device was designed to combat." 67 LRRM at 2009.

Likewise, no evidence was ever presented tending to conflict with the Regional Director's critical findings regarding the Scroggins episode. In his Request for Review, Company *counsel* asserted that the union agent spoke falsely when he warned Scroggins about a Company foreman's attitude (R. 86). But, again, the sole evidence proffered on this point by the Company, *i.e.*, the Hughes affidavit, contains nothing to support the lawyer's allegation. Accordingly, the Regional Director's finding that the union agent did not misrepresent Scroggins' status was never the subject of any evidentiary conflict warranting a hearing.

And since the Company raised no new issues or evidence during the unfair labor practice proceedings, but simply renewed the arguments already considered and rejected in the representation case, the Board was entitled to grant the General Counsel's motion for summary judgment. A party has no right to relitigate in the unfair labor practice case issues already litigated in the representation case. *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146; *N.L.R.B. v. Tennessee Packers, Inc., supra; N.L.R.B. v. National Survey Service, Inc., supra; Rockwell Mfg. Co. v. N.L.R.B., supra; N.L.R.B. v. Clearfield Cheese Co., supra; N.L.R.B. v. B. H. Hadley, Inc.*, 322 F. 2d 281 (C. A. 9).

Petitioner's criticism of the Board's summary judgment procedure requires no separate answer since, as petitioner concedes (Br. 19), the procedure is entirely appropriate in the absence of unresolved material factual issues. To the extent that petitioner buttresses his critique by reference to the general reluctance of federal district courts to

grant summary judgment, however, it seems appropriate to point out what petitioner has overlooked. First, district courts, unlike the Board, have no investigative machinery designed to provide an impartial independent factual inquiry. While the Board does not permit the administrative investigation to perform the function of resolving evidentiary conflicts, the investigation can, nonetheless, provide disclosure of matters which obviate the need for a hearing. For example, the investigation may provide an undisputed context or background which wholly dilutes any coercive effect inferable from the disputed incident itself. Second, much of the district court reluctance to grant summary judgment except in the clearest cases derives from the overriding nature of the constitutional right to a jury trial. No such overriding policy applies here. Indeed, Congress' expressed interest has been to eliminate time-consuming formal proceedings in these proceedings except where the complaining party clearly shows the need for a hearing. *N.L.R.B. v. Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 249 (C.A. 5); *N.L.R.B. v. Sun Drug Co.*, 359 F. 2d 408, 414 (C.A. 3); see also, *J. R. Simplot, supra;* and *Joclin Mfg. Co., supra.*

Perhaps the most obvious distinction between district court summary judgment and the Board's procedure is the allocation of the burden of proof. Under the Federal Rules (Rule 56), the burden is on the party moving for summary judgment to demonstrate that "there are no genuine issues of material fact." *Cf.*, Wright, *Federal Courts* at 388. Before the Board, however, the burden rests on the party

seeking a hearing to show that there are "substantial and material factual issues" which can only be resolved by a hearing. *N.L.R.B. v. J. R. Simplot Co., supra* and cases cited at p. 17.

In light of these important differences between the Board and the district courts, petitioner can hardly fault the Board for refusing to adopt all the nuances of district court practice and philosophy.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for review should be denied, and the Board's cross-petition for enforcement should be granted.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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